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CENTER FOR CONSTITUTIONAL RIGHTS

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Statement of Peter Weiss

LAW AND FOREIGN POLICY

This government claims to be one of laws, not men; we live under the banner of "law and order"; a succession of Presidents and Secretaries of State since the end of World War II have affirmed that American foreign policy is guided and inspired by the quest for "the rule of law".

Yet American conduct abroad, during the past two and a half decades, has been more than lawless; it has been, in instance after instance, downright criminal. Treaties solemnly entered into by the United States government, such as the Hague and Geneva Conventions, have been, and continue daily to be, not so much violated, as simply ignored. The Nuremberg principles, fashioned in large part by Americans and once hailed as a milestone in man's gradual emergence from the cave, now tend to be regarded as a temporary and embarrassing aberration.

The massacre in Vietnam is a campaign of extermination waged against non-persons in accordance with non-laws and non-treaties. The Pentagon Papers, so full of weighings, musings and analyses by experts in social psychology, diplomacy, weapons systems and cultural anthropology, are remarkably devoid of any input by lawyers, at least in the version made available to the public so far. Veterans who have testified to the commission of war crimes are hounded by the FBI and the CID, while specific accusations of crimes

go uninvestigated or unprosecuted. (See the case of Colonel Herbert).

To the extent that any persons or institutions wielding power in our society do pay attention to the precepts of international law, it is solely for polemical purposes. The American Bar Association, at its most recent meeting in New York in July, struck a mighty blow for even-handed justice by voting up a resolution calling on all governments party to the Geneva Convention to urge the Democratic Republic of Vietnam to comply with the terms^{thereof} in its treatment of American prisoners, while voting down a resolution calling for the establishment of a committee to investigate American war crimes in Vietnam, on the ground, if you please, of insufficient staff and funds.

The White House, the State Department and the military have not even thought it necessary to reply to the troubled and thoughtful questions raised by such distinguished critics as Telford Taylor, except in the most perfunctory terms. And the courts, with near unanimity, have dismissed such questions as being "non-justiciable".

It is, of course, not only with respect to Vietnam that our government and its agents are acting as law-breakers and law-ignorers, but with respect to every other corner of the globe in which we believe our vital interest gives us the right to carry, and wield, a big stick. Che Guevara was murdered by the CIA, Mozambican guerillas are being burned to

death by American-made napalm, and in Pakistan, continued American arms aid makes us accessories before the fact to famine, rape and slaughter.

What Pentagon Papers are there about the recent counterrevolution in Bolivia? What brilliant contingency plans are being drafted by hard-nosed idealists to get rid of Allende, dead or alive, or to end the Rhodesian sanctions? Who cares?

Maybe crime in high places cannot be dealt with unless the whole system changes. Maybe it is foolish to expect the United States to conduct itself lawfully abroad, when official lawlessness is the order of the day at home. Maybe, on the other hand, some changes in method, or structure, could help to make international law less of a joke and more of a restraining force, and maybe this could save some tens, or thousands, or millions of lives, both American and non-American.

Here, then, are some specific suggestions:

1) Legal Clearance

There should be some regular mechanism for obtaining qualified legal advice as to the legality of policies and programs contemplated by the executive branch of the government, before they are implemented. There is no indication that either the Legal Adviser to the Secretary of State or the General Counsel of

the Department of Defense have ever been asked to advise on the legality, under international law, of such programs as "Rolling Thunder" or "Operation Phoenix", either before or after their inception. There should therefore be created, under the jurisdiction of the Senate or of the whole Congress, the office of Counsel on International Law. It should be the duty of such Counsel to review all appropriation measures which may involve violations of international law and to advise the Congress as to the existence or non-existence of such violations. The necessity for such review arises from the fact that, as to domestic law, Congress operates under the potential restraint of the courts, which are the proper source of rulings concerning the constitutionality of laws passed or programs financed by the Congress, while, as to matters of international law, there is, by and large, no ultimate tribunal able or willing to pass judgement.

2) Education for Policy Makers

Since both civilian and military makers and executors of U. S. policy have been shown, through the revelations of the Pentagon Papers,

veterans' war crimes hearings and the My Lai courts-martial, to be woefully uninformed and unconcerned about the rules of international law, drastic and effective steps should be taken to familiarize such personnel with the laws of war by which the United States claims to be bound, including the Hague and Geneva Conventions and the Nuremberg Principles. Every agent of the United States government whose actions and decisions may, in the normal course of events, be expected to fall under the mandates of international law, from the President on down to the lowliest GI, foreign service officer and CIA operative, should be required by law or Executive Order to undergo a thorough initial training course, as well as periodic refresher courses, in the applicable principles of the law of nations. The curricula and syllabuses of the Foreign Service Academy, basic military training courses, the War College, the Service Academies, and similar institutions should be reviewed for the purpose of strengthening their content in the field of international law.

3) The Oath of Office

The traditional oath of office, which pledges officers of the government to defend the Constitution of the United States, should be amended to require an equal degree of allegiance to the United Nations charter, the law of nations and specific treaty commitments of the United States. It may, of course, be argued that, under Article VI, Clause 2 of the Constitution, treaties are "the supreme law of the land", so that obedience to treaties follows from obedience to the Constitution. This command, however, is more honored in the breach than the acceptance, so that its specific reaffirmation in the oath of office seems highly desirable. The United States should also take the initiative in introducing, in the United Nations, a resolution calling on all members to effect similar amendments in their respective oaths of office.

4) The Responsibility of the Courts

As noted above, American courts have been shamefully pusillanimous in coming to grips with questions of war crimes and other questions of international law presented to them in recent years as a result of our tragic

involvement in Vietnam, dismissing such questions as "political", "non-justiciable", or barred from consideration by "lack of standing". While interference by one branch of the government with the conduct of another is always a highly sensitive matter, it seems appropriate for the people, through the inclusion of appropriate language in next year's political platforms, to remind the courts that, as the guardians of law and order, they cannot shirk their responsibility by retreating behind technical or semantic facades. Indeed, it may be appropriate to remind our judges that, less than thirty years ago, a number of German judges were compelled to stand trial for subordinating their allegiance to law and justice to service to a criminal state. Consideration should also be given to amending the judicial oath of office in a manner similar to that suggested in the preceding section for the oath of office required of officers of the executive branch.

5) Steps Toward Effective International Criminal Law Enforcement

The Calley trial and the few other similar trials of recent years have created the quite erroneous impression that war criminals are, in fact,

vigorously prosecuted by American authorities. Nothing could be further from the truth. For every well-publicized My Lai incident resulting in prosecutions, there have been thousands of others in which atrocities committed with the full knowledge of higher authority did not give rise even to preliminary legal proceedings.

What is worse, there are dozens, if not hundreds, of cases on record in which war crimes charges brought by members of the armed forces have been dismissed in the most cavalier manner after the most cursory kind of "investigation". This suggests the need for one or more of the following remedial steps:

- a. The present procedure, in which charges of war crimes by members of the armed forces are investigated by officers in the direct line of command of the accused and who, more often than not, may share the guilt of the accused, should be replaced by one in which such charges are brought before a Special Prosecutor for Military War Crimes. The latter should be a civilian lawyer responsible solely to the Secretary of Defense and should have an adequate, full-time staff at his disposal for the

investigation of complaints and the preparation and prosecution of charges. This, of course, would require an amendment to the Uniform Code of Military Justice, but it is difficult to see how anything else could put flesh on the bare bones of Army Field Manual No. 27-10, "The Law of Land Warfare", an excellent but almost totally ignored statement of the criminal liability of United States servicemen under international law.

- b. A manual similar to FM 27-10 should be prepared for the State Department, the CIA, AID and other civilian agencies engaged in foreign operations, and the office of Special Prosecutor for Civilian War Crimes should be established to receive and process complaints against officials and employees of such agencies. This office should operate under the jurisdiction of the Attorney General.
- c. As an alternative, or as a supplement, to the two previous suggestions, the United States should back the proposal endorsed by an increasing number of international lawyers

and legal organizations for the establishment of an International Criminal Court.

(See J. Stone, "An International Criminal Court", World Peace Through Law Center, Geneva 1971).

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Some or all of the above suggestions may seem quixotic, but perhaps the madness which seeks to reconcile the real with the ideal is to be preferred to the madness ruling our leaders, which assumes that the real and the ideal, in world affairs, can continue indefinitely to run in apposite directions.

In the words of Dwight Eisenhower, who looks better and better as more and more becomes known about the secret policies of his predecessors and successors, "The world no longer has a choice between force and law; if civilization is to survive, it must choose the rule of law".